PP

v.

MAK YOKE KUEN

HIGH COURT MALAYA, IPOH
TEO SAY ENG JC
[CRIMINAL TRIAL NO: M6-45-29-2008]
20 SEPTEMBER 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39(B)(1)(a) - Trafficking in dangerous drugs - Mens rea - Whether custody and control of car sufficient to trigger presumption of possession of drugs hidden in car - Section 37(d) Dangerous Drugs Act 1952 - Whether prosecution proved accused had possession and knowledge of drugs in car - Whether testimony of prosecution witness created doubt - Whether evidence of police witnesses contradictory*

The accused was charged with trafficking in 101.9g heroin and monoacetylmorphine and 154g methamphetamine on two charges under s. 39(B)(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The prosecution's evidence was that police had maintained surveillance on the movements of a certain BMW car following a tip-off that a woman using that car was carrying out drug trafficking activities. Police subsequently arrested the accused as she was about to get into the car. When they checked the car at the place of arrest, the police allegedly found 'drugs' (not the subject matter of the charges in the instant case) in the side pocket of the driver's door. They then brought the car to the police station where another search was carried out by a police officer ('SP3') but no drugs were found. SP3 testified that he then told SP4 and another police officer to watch over the car while he briefly left the scene with the accused and that on his return SP4 told him he had found a compartment ('the compartment') below the steering wheel which SP4 then opened with a screw driver and retrieved several plastic packets containing drugs (the subject matter of the charges) therefrom. SP3, when cross-examined, however said when he returned to the car after being away, he saw that SP4 had already opened the compartment and was holding one of the plastic packets. SP4 on the other hand testified that he only screwed open the compartment on SP3's instructions. A BMW service advisor, called as a prosecution witness, testified that it was "impossible" for the compartment, because of its size, to have held the plastic packets that contained the drugs in the instant case. The car, which was registered in the accused's adopted sister's name, was also

A not produced in court and in its place photographs of the car and its interior were tendered as evidence. The car had been released to the owner but despite police efforts she was not traceable to be called as a witness. In her place, a statement recorded from her under s. 112 of the Criminal Procedure Code ('the s. 112 statement') was tendered in
B evidence in which the owner said the accused was in possession of the car for two weeks prior to her arrest. The defence contended, *inter alia*, that the prosecution had failed to prove the accused alone had care, control and possession over the car; that there was serious doubt the drugs were actually found in the compartment and that the s. 112
C statement should not be given any weight as there was no opportunity for the owner of the car to be cross-examined. The prosecution relied on the presumption of possession and knowledge of the drugs under s. 37(d) of the DDA to show that the accused by transporting the drugs in the car was trafficking in it.

D **Held (acquitting and discharging the accused on both charges without calling for her defence):**

(1) The mere presence of the accused in the BMW car in the absence of any other evidence was insufficient to prove she knew that the
E packages were concealed in the compartment behind the steering wheel. The fact that the packages could not have been detected by a search carried out by SP3 with the aid of a police sniffer dog clearly showed the packages were very well concealed and could not be easily detected by the police let alone a lay person. In the absence of any knowledge of the packages it could not be said that
F they were in the accused's custody or control. (paras 57 & 58)

(2) To prove the accused had custody or control over the packages, the prosecution had to prove she had some idea of their whereabouts or at the very least strong inference that she knew of their
G existence. (para 55)

(3) The prosecution's evidence at the close of its case was insufficient to invoke s. 37(d) of the DDA to deem the accused to have been in possession of the drugs. The mere fact she had custody or control over the car was not sufficient to invoke s. 37(d). Both the
H then Supreme Court and the Federal Court had approved the proposition of law that in cases where drugs were found in a vehicle, the presumption in s. 37(d) could not arise as such vehicle did not fall within the words "anything whatsoever containing any dangerous drugs". (paras 46 & 64)

I

(4) There was serious doubt whether the compartment could have contained the drugs as claimed by the police witnesses. The photographs of the interior of the car even if accepted could not help the parties and the court in solving the doubt. The credibility of SP3 and SP4 who testified that the packets of the drugs were recovered from the compartment was also doubtful because of the discrepancies between their testimonies in describing how the exhibits were recovered. (para 50)

(5) The prosecution could not rely on the s. 112 statement of the car owner to prove the accused was in possession of the car for two weeks prior to her arrest. Not much weight could be given to such a statement since the evidence was not on oath and had not been tested under cross-examination. (para 50)

(6) Sections 6 and 7 of the Evidence Act 1950 were not applicable here for the prosecution to say the 'drugs' recovered from the side pocket of the driver's door was a relevant fact to be considered. This was because the 'drugs' were not tendered in Court and proven in fact to be dangerous drugs under the DDA. Even if ss. 6 and 7 were applicable, that still did not relieve the prosecution from proving the accused had possession of the drugs found inside the compartment. This, the prosecution had failed to do. (paras 55 & 60)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Johar Mustafa [2004] 5 CLJ 187 HC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP lwn. Roya Boola [2003] 1 LNS 385 HC ***(refd)***
PP v. Tan Hock Beng [2002] 3 CLJ 177 HC ***(refd)***
Syed Ali Syed Abdul Hamid & Anor v. PP [1982] CLJ 188; [1982] CLJ (Rep) 340 FC ***(refd)***
Tong Peng Hong v. PP [1955] 1 LNS 165 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 180(1), 413
Dangerous Drugs Act 1952, ss. 2, 37(d)
Evidence Act 1950, ss. 6, 7, 32(1)(i), 62

For the public prosecutor - Zalina Awang; DPP
For the accused - Naran Singh; M/s Naran Singh & Co

Reported by Ashok Kumar

JUDGMENT

Teo Say Eng JC:

[1] The accused was charged as follows:

1st Charge

> Bahawa kamu pada 14 Disember 2007, jam lebih kurang 1.00 pagi di hadapan perkarangan Pejabat Jabatan Siasatan Jenayah Narkotik, Ibu Pejabat Polis Kontijen, Jalan Sultan Iskandar, Ipoh dalam Daerah Kinta, di dalam Negeri Perak, telah mengedar dadah berbahaya, iaitu 101.9 gram heroin dan monoacetylmorphine, (87.1 gram heroin dan 14.8 gram monoacetylmorphines) dan dengan itu kamu telah melakukan suatu kesalahan dibawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum dibawah seksyen 39B(2) Akta yang sama.

2nd Charge

> Bahawa kamu pada 14 Disember 2007, jam lebih kurang 1.00 pagi dihadapan perkarangan Pejabat Jabatan Siasatan Jenayah Narkotik, Ibu Pejabat Polis Kontijen, Jalan Sultan Iskandar, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak, telah mengedar dadah berbahaya, iaitu 154 gram methamphetamine, dan dengan itu kamu telah melakukan suatu kesalahan dibawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum dibawah seksyen 39B(2) Akta yang sama.

[2] Both the charges were jointly tried. The prosecution had called nine witnesses to prove its case against the accused. The prosecution was relying on s. 37(d) and s. 2 of the Dangerous Drugs Act 1952.

Prosecution Case

[3] The prosecution case was based mainly on the evidence of two very material witnesses, that is SP3 and SP4. Their evidence may be summarised as follows:

[4] On 6 December 2007 at about 5pm, while SP3 was in his office, he received information that a female person in her forties driving a BMW car silver in colour with the registration number WHT 8373 was carrying out drug trafficking activities in the area of Tesco hypermarket. At about 6pm SP3 together with D Sjn Ariffin, D Kpl Meor and DL Kpl Rosmiwati left for Tesco hypermarket in a government owned vehicle. While in the Restaurant Nashmir opposite Tesco, SP3 spotted the Silver BMW car with registration number WHT 8373 passing Tesco. SP3 and the police party followed the car. The BMW car after reaching Kg. Simee was seen entering into a garage of a house at No. 79, Lengkuk Tebing Kinta in Taman Mirindy. They saw a lady in her forties come out of the car and enter the house. They then returned to JSJN IPK Ipoh.

[5] On 9 December 2007 SP3 together SP4 and D Kpl Meor went to the female person's house in Taman Mirindy twice to conduct observation: once in the morning at 10am and the second time at 2pm. They spent about one hour on each observation. On both the occasions, they saw a female Chinese in the house. On the first occasion, the said BMW car was seen in the garage but on the second occasion the said BMW car was seen outside the house. On both the occasions, since nothing suspicious was discovered SP3 and his police party returned to the Balai.

[6] On 13 December 2007 at about 4.30pm, SP3 received information that the said BMW car would be involved in drug trafficking activities in the area of Tesco hypermarket. SP3 together with SP4, D Kpl Meor and DL KPI. Rosmiwati at about 6.30pm proceeded to the area of Tesco hypermarket and stopped at Restaurant Nashmir for a drink. While they were there, they saw the BMW car WHT 8373 passing in front of them. They then followed the said car from Jusco to the North Sourth highway to Jelapang Toll. From Jelapang toll, they followed the car to a Caltex Petrol Station in a rest area at R & R Bukit Gantang. SP3 and the police party saw a female Chinese pumping petrol there.

[7] After pumping petrol the female Chinese drove the BMW car passing the Jawi toll, turning left into a housing area that is Taman Sintar Indah, Nibong Tebal and parked the car near a telephone booth. About 15 minutes later, a Proton Wira came and parked besides the BMW car. The police party saw a male Chinese carrying a paper bag and walking towards the BMW car and was seen handing over the said plastic bag to the female Chinese in the BMW car. After the male Chinese left the place in his Proton Wira, the female Chinese then drove the BMW from the place towards Jawi toll and then entered the highway heading for Ipoh.

[8] While trailing the BMW car, the police party saw papers being thrown out of the BMW car. Nevertheless, they proceeded to trail the BMW car to Jelapang toll and from Jelapang toll to Jaya Jusco and Courts Mammoth in Ipoh. The BMW car stopped there for 15 minutes and then proceeded and parked in front of a Michelin tyre shop opposite the Tesco hypermarket. A Proton Wira was seen parking by the side of the road waiting for the female Chinese.

[9] The female Chinese was seen alighting from the BMW car and locking car by using an 'alarm'. The female Chinese then was seen handing something to a male Chinese. After handing over the 'something', the female Chinese returned to her car.

[10] It was at that point of time SP3 instructed SP4, Kpl Meor and Kpl Wanita Rosmiwati to arrest the female Chinese. SP4 had identified himself as police and Kpl Wanita Rosmiwati managed to arrest the female Chinese. The female Chinese was identified to be the accused in this case. A body search was conducted by Kpl Wanita Rosmiwati but nothing incriminating was found. SP3 and SP4 then conducted a search inside the BMW car and found by the side pocket of the driver's door a blue bag containing the following:

(a) Four strips of erimin 5,

(b) Four plastic packets containing crystal powdery substance suspected to be syabu.

(c) Two packets containing powdery substance suspected to be ketamine.

[11] The search on the BMW car was conducted in front of the Michelin tyre shop on 13 December 2007 at about 11.30pm.

Note: The above "drugs" recovered are not the subject matters of the two charges of this case.

[12] SP3, then instructed SP4 to drive the BMW car together with SP3, the accused and L Kpl Rosmiwati to IPK Ipoh.

[13] On 14 December 2007 at about 12 midnight, the police party reached JSJN IPK. At IPK two searches were conducted inside the car The first search was conducted by SP3 himself with the help of the police sniffer dog arranged by officer from Bukit Aman. Nothing was recovered.

[14] As regards the second search, there are some variations as to how the exhibits which formed the subject matters of the two charges were recovered.

[15] According to SP4, on 14 December 2007 at about 1pm at IPK Ipoh when he saw a suspicious compartment below the steering wheel towards its right, he informed SP3 who instructed him to open the compartment. SP4 then used a screw driver to open the said compartment and found the following proscribed drugs hidden inside the compartment:

(a) Three plastic packets containing substance suspected to be heroin.

(b) One black plastic bag in which was found four big plastic packets containing substance suspected to be syabu and five plastic packets containing substance suspected to be ketamine.

[16] He then took out the proscribed drugs and handed them to SP3. According to SP3, after conducting the first search at IPK Ipoh, he then instructed SP4 and D Kpl Meor to search the car again. It was at that moment the accused complained to him that she was sick, and SP3 together with L Kpl Rosmiwati took her to the enquiry office to get some medicine. It is to be noted that during re-examination, SP3 told the court that before they left for the enquiry office he did not instruct SP4 and Kpl Meor to search the BMW car but he only asked them to watch over the BMW car.

[17] According to SP3, on their return from the enquiry office, SP4 informed him that he found a suspicious compartment below the steering wheel on the right hand side. At that time, SP3 was on the right hand side of the BMW car. He also saw that the said compartment had traces of being opened as pointed out by SP4 to him. SP4 then opened the compartment with a screw driver and took out the proscribed drugs one by one and handed over to him. At that moment the accused was just right behind him. However, during cross-examination, SP3 agreed with the suggestions made by the learned defence counsel that on their return from the enquiry office, and when he was somewhere near the BMW car, he saw that the compartment had already been opened and SP4 was already holding one plastic packet and then handed it to him whilst taking some more from the compartment.

[18] Be that as it may, the prosecution was trying to prove that the proscribed drugs which formed the subject matters of the two charges were hidden in the compartment of the BMW car and were recovered by SP4.

[19] After receiving the exhibits from SP4, SP3 was holding them and together with the police party excluding SP4 entered the said car and proceeded to the accused's house. A search was conducted in the accused's house but nothing incriminating was recovered.

Evidence As Regards The Compartment Where The Exhibits Were Recovered

[20] The prosecution had adduced evidence through SP3 and SP4 that the exhibits were hidden in a compartment in the BMW car driven by the accused.

[21] The prosecution had summoned a service adviser one Mr Kevin Leong Ming Jen from BMW Tian Siang Ipoh whose field of expertise was on total build of a BMW vehicle. He said he holds a Diploma in Design of BMW vehicles from WIT Workers Institution of Technology and from BMW Cyberjaya HQ. He said he was shown the vehicle BMW WHT 8373 by CI Hafizuddin SP7 and he identified the vehicle from two photographs shown to him in court (P5J and K). When

SP6 was shown the compartment of the BMW car in P5L and M, he said the said compartment was under specifications for Model E46. He said the compartment was for small storage purposes. To open the compartment, it is with finger touch flip open. To open the inner part of the compartment it is by way of loosening screws at the four corners by using Philips head screw driver. SP6 also gave a rough estimate of the size of the compartment to be 15cm x 6cm. To a question put by the learned counsel for the defence when shown with exhibits P8C, P8F and P8I, whether it was possible for these three plastic packets to be placed in the said compartment SP6 without hesitation answered "It is impossible".

On The Admissibility Of The 112 Statement Of The Registered Owner Of The BMW Car Under Section 32(1) Of The Evidence Act 1950

[22] According to SP7, the IO of this case, the BMW car WHT 8373 was registered in the name of one Choong Poh Kuen KPT 740112-08-5364. He did record a 112 statement from the owner of the car who was the accused's adopted sister.

[23] The BMW car was not produced in court. According to SP8 Insp Mohd Azri bin Mohamad Jalil, who was the IO who took over from SP7 since August 2008, upon the request by the registered owner of the BMW car that she needed the car for her daily use, the said car was returned to the owner under a bond executed under s. 413 of the Criminal Procedure Code on 18 November 2008. The registered owner of the car did not appear in court. Neither was the BMW car produced in court.

[24] In the circumstances, the prosecution was seeking to admit the 112 statement of the registered owner under s. 32(1)(i) of the Evidence Act 1950. The prosecution had adduced evidence through SP7 that he had instructed Insp Nasrul Hisham to trace the registered owner and to make searches with the government agencies like Jabatan Pendaftaran Negara, KWSP and the like. SP7 was also informed by Insp Nasrul that advertisement had been put up to look for the registered owner. SP7 said he was yet to get the results from Insp Nasrul. SP7 also told the court that when he recorded a statement under s. 112 of the CPC from the registered owner, he had complied with all the requirements of s. 112 of the CPC. A 112 statement by Choong Poh Kuen was tendered and identified by SP7.

[25] The learned defence counsel did not challenge the evidence adduced by the prosecution in the examination in chief but merely submitted that the prosecution had failed to comply with s. 32(1)(i) of the Evidence Act 1950.

[26] Since the defence did not seriously challenge the efforts made in tracing the owner of the car by the prosecution and the requirements of s. 112 of the CPC in admitting the 112 statement, I was satisfied that the diligent efforts had been made by the police in tracing the owner of the car and the requirements of s. 112 of the CPC had been complied with and ruled that the 112 statement of Choong Poh Kuen was admissible under s. 32(1)(i) of the Evidence Act and marked the document as P20.

The Chain Of Evidence In Relation Of The Movement Of The Exhibits

[27] On 14 December 2007 at about 1am SP4 recovered the proscribed drugs from the compartment of the BMW car and handed them to SP4. After receiving the proscribed drugs from SP4, SP3 took them with him and proceeded with the police party to the accused's house and conducted a search there. But nothing incriminating was found.

[28] On his return to the police station, he did the following:

(a) He marked the exhibits as follows:

(i) Three plastic packets as A, B and C respectively (P8B, P8E and P8H).

(ii) One black plastic bag as D (P11A),

(iii) Ten plastic packets as D1-D10 (P9B (1-9) and P10B). Apart from the marking, he wrote Pusat Repot No. 7181/07 subscribed his signature and put the date 14 December 2007 on each of the above plastic packets.

(b) He lodged a police report that is Pusat Repot 7181/07.

(c) He issued a search list (P17) and signed by the accused.

[29] On 14 December 2007 at about 10.30 am SP3 handed the accused together with the exhibits and the BMW car WHT 8373 to SP7 (IO). SP7 confirmed that he received the following exhibits from SP3:

(i) Three plastic packets containing substance suspected to be heroin marked A, B and C respectively.

(ii) One black plastic bag marked D.

(iii) Nine plastic packets containing substance suspected to be syabu marked D1-D9 respectively.

A (iv) One plastic packet containing substance suspected to be ketamine marked D10 and

(v) One BMW car number WHT 8373 together with its keys.

[30] SP7 confirmed that each of the plastic packets was written with B Pusat Repot 7181/07, dated 14 December 2007 and was signed by SP3.

[31] After receiving the said exhibits, he weighed the proscribed drugs. After weighing, he kept all the exhibits in his steel cabinet under lock and key. On 15 December 2007 at about 11.30am he instructed the C photographer (SP1) to take photographs of the exhibits (proscribed drugs) in his office and of the BMW car WHT 8373 in front of his office and after that he kept the exhibits (proscribed drugs) in his steel cabinet under lock and key.

[32] On 18 December 2007 at about 10am, he sent the exhibits D (proscribed drugs) to Bahagian Forensik D6, IPK to one L Kpl Patrick Chia for finger print dusting. He was told by L Kpl Patrick Chia that the results were negative. He told the court that when the finger print dusting was conducted, all the exhibits (proscribed drugs) were under his control.

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[33] On the same day at about 11am, he reached his office. He then packed the exhibits as follows:

(a) He placed three plastic packets marked A, B and C in one envelope marked E.

F

(b) He placed nine plastic packets marked D1-D9 in another envelope marked E1.

(c) He placed another plastic packet marked D10 in another envelope marked E2.

G

(d) He placed a black plastic bag marked D in an envelope marked E3.

[34] On the same day after packing the said exhibits, at about 2pm he sent the exhibits (proscribed drugs), that is, three envelopes marked 'E', 'E1' and 'E2' to the chemist SP5 for analysis.

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[35] Whereas he kept the envelope marked 'E3' in his steel cabinet under lock and key.

[36] On 25 February 2008 at about 12.55 noon, SP7 received the I same exhibits after analysis together with a chemist report (P14) from SP5 and kept them in his steel cabinet under lock and key.

[37] On 25 March 2008 he sent the exhibits, that is, four envelopes marked E, E1, E2 and E3 to the exhibits store for registration. The exhibits were received by SP2 and were registered as ER 146/2008 - (see P7 and P7A).

The Chemist Evidence

[38] The envelopes marked E, E1 and E2 were sent by SP7 the IO to the chemist SP5 for analysis. SP5 had examined and analysed the contents of envelopes marked E, E1 and E2 and his findings were as follows:

(a) The three plastic packets in envelope marked E were found to contain 87.1g of heroin and 14.8g of monoacetylmorphine.

(b) The nine plastic packets marked D1-D9 in envelope marked E1 were found to contain 150.3g of methamphetamine and

(c) The plastic packet marked D10 in envelope marked E2 was found to contain 3.7g methamphetamine.

[39] SP5 also confirmed that the heroin monoacetylmorphine and methamphetamine are all listed in the first schedule of the Dangerous Drugs Act 1952.

The Defence Contention

[40] The defence attacked the prosecution case on the following grounds:

(a) A serious doubt had arisen as to whether the proscribed drugs were actually recovered from the compartment of the BMW vehicle?

(b) The prosecution failed to prove that the accused alone had care and control and possession over the BMW car.

(c) There was gap in the prosecution case by not producing the car in court. Identification of the car through photographs taken which are themselves secondary evidence should be rejected under s. 62 of the Evidence Act 1950. He cited *PP v. Tan Hock Beng* [2002] 3 CLJ 177 in support of his contention.

(d) Exhibit P20, 112 statement should not be admitted as no diligent efforts had been made to trace the owner of the car. Even if such a statement was admitted, the court should not give any weight to it as the defence was not given the opportunity to cross-examine the maker of the statement.

(e) There was a gap 9 1/2 hours in the prosecution case in relation to the movement of the proscribed drugs from the time they were seized by SP3 on 14 December 2007 at 1am till the time they were handed over to the IO SP7 on 14 December 2007 at about 10.30am.

The Burden Of Proof

[41] Section 180(1) of the CPC reads:

> When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused.

[42] The Court of Appeal in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 has laid down the test in determining whether a *prima facie* case had been proven by the prosecution, that is:

> It therefore follows that there is only one exercise that a judge sitting alone under section 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

[43] The test laid down in *Looi Kow Chai* is the same as that stated by Augustine Paul JCA (as he then was) in the Federal Court case of *Balachandran v. PP* [2005] 1 CLJ 85.

[44] It is therefore clear that the law as it stands requires the judge to subject the prosecution evidence to a maximum evaluation test in determining whether a *prima facie* case had been established under s. 180(1) of the CPC.

The Law Relied Upon By The Prosecution

[45] At the very inception it is clear that prosecution is relying on s. 37(d) and s. 2 of the DDA 1952 to prove the case against the accused.

[46] In cases where drugs are found in a vehicle the presumption contained in s. 37(d) could not arise as the vehicle in which the drugs were found did not fall within the words 'anything whatsoever containing any dangerous drugs': *Tong Peng Hong v. PP* [1955] 1 LNS 165. This proposition of law was approved by the then Supreme Court in *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 and the Federal Court in *Syed Ali Syed Abdul Hamid & Anor v. PP* [1982] CLJ

188; [1982] CLJ (Rep) 340. Therefore the mere fact the accused had custody or control over the vehicle is not sufficient to invoke s. 37(d) of the Dangerous Drugs Act 1952.

[47] In order to invoke s. 37(d) of the DDA 1952 the prosecution must prove that the accused had custody or control over the packages containing the proscribed drugs so that the accused shall be deemed to have been in possession of such drugs and shall, until the contrary is proved be deemed to have known the nature of such drugs.

[48] The issues for determination are:

(a) Had the prosecution adduced sufficient evidence to prove that the accused had custody or control over the packages containing the proscribed drugs found concealed behind the steering wheel in the car?

(b) Was there sufficient evidence to say that the accused was transporting the said proscribed drugs within the meaning of s. 2 of the Dangerous Drugs Act?

Evaluation Of Evidence And Findings By The Court

[49] The following facts are not in dispute:

(a) The car did not belong to the accused. It was registered in the name of Choong Poh Kuen.

(b) The accused was seen driving the car and alighting from it on 13 December 2007 and 14 December 2007.

(c) The accused was alone in the car at the material time.

(d) On 6 December 2007 and 9 December 2007 a Chinese female was seen driving the BMW car WHT 8373. The identity of the driver had not been established by the prosecution.

(e) The compartment where the packages were found were not a specially constructed compartment.

[50] I shall now deal with the following issues which are in dispute:

(a) Whether the accused was in possession of the BMW car WHT 8373 for two weeks or more prior to her arrest?

The prosecution was relying on P20, that is, the 112 statement of the car owner. I am of the view that the prosecution cannot rely on the 112 statement of the owner (P20) to prove that the accused was in possession of the car for two weeks, although it was ruled that the statement was admissible under s. 32(1)(i) of the Evidence

A Act 1950. I do not think that much weight can be given to such a statement since the evidence was not on oath and had not been tested under cross-examination. I therefore rule that this fact had not been proven.

B (b) Whether the prosecution had proven that the packages containing the proscribed drugs were concealed and recovered in a compartment located below the steering wheel of the BMW on its right side?

SP6 was an independent witness called by the prosecution to testify C whether the compartment where the proscribed drugs were found was a specially constructed compartment. He had examined the compartment and said that it was not a specially constructed compartment. He had also given a rough estimate of the measurement of the compartment as 15cm by 6cm which he said D was meant for small storage purposes.

When he was shown the three packages (P8C, P8F and P8I) in court and was asked whether the compartment could accommodate the said packages. He answered very positively "It is impossible to place these three packages in the small compartment".

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Obviously there is a serious doubt as to whether the said compartment can contain the proscribed drugs found as claimed by the police witnesses. Since this piece of evidence is from an independent witness summoned by the prosecution I see no reason F why he should lie in court.

However, the doubt would have been solved had the police tendered the BMW car for all the parties to inspect. The prosecution submits that failure to tender the car was not fatal as they could still rely on the photographs tendered.

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[51] As regards the photographs which were marked as P5J to N, the learned counsel for the defence submits that the photographs were secondary evidence and should not be accepted by the court and the BMW car must be produced as the best evidence rule must apply. In H support of the contention he cited *PP v. Tan Hock Beng* [2002] 3 CLJ 177.

[52] In *Tan Hock Beng's* case, the motocycle which was the subject matter of a serious charge was auctioned off. The court found that there was a serious aberration of duty and ought to have been investigated I but no one came forward to explain.

[53] In our case, the police had explained that the car was released to the owner through a bond executed under s. 413 of the CPC. I am not in the position to comment whether that was the right procedure at this juncture, as the records of the proceeding are not with this court. However, the car was released through a procedure executed before a magistrate. The police had also explained that they had made efforts to trace the owner to produce the car which I had accepted as reasonable efforts being made on their part. For the above reasons, since the police could not produce the car after reasonable efforts had been made to trace the owner, I accept the photographs (P5J to N) as the next best evidence available.

[54] However, the photographs (P5J to N) even if accepted by the court, would not help the parties and the court in solving the doubt raised by SP7. Moreover, the credibitlity of SP4 and SP3 who testified that the said packages of the proscribed drugs were recovered from the compartment of the BMW car was further doubted by the following facts:

(a) The discrepancies between the testimonies of SP3 and SP4 in describing the ways the exhibits were recovered:

Firstly, according to SP4, after the recovery of some 'drugs' Erimin 5/ Ketamine from the side pocket of the driver's door, in front of the Michelin tyre shop and after the BMW car had been driven to JSJN IPK Perak, SP3 did instruct him and Kpl Meor to conduct a search on the BMW car. However, SP3 in evidence in chief confirmed that he did instruct SP4 and Kpl Meor to conduct a search on the BMW car but in re-examination he said he only instructed them to watch over the BMW car but did not ask them to search the BMW car before he took the accused to the enquiry office to get the medicine.

Secondly, again according to SP4, when he saw a suspicious compartment below the steering wheel on its right, he had informed SP3 about it. SP3 then instructed him to open the compartment with a screw driver. SP4 then opened the compartment with a screw driver and found the packages of the proscribed drugs and removed and handed them to SP3.

Whereas SP3 initially in examination in chief said that he did notice the compartment having traces of being opened as pointed out to him by SP4 and then the compartment was opened up by SP4 with a screw driver and SP4 took the proscribed drugs out one by one from the compartment and passed the exhibits to him. During the cross-

examination, SP3 changed his version by saying that when he returned from the enquiry office with the accused and L Kpl Rosmiwati, he saw SP4 was then holding a plastic bag and the compartment had already been opened. SP4 then handed the plastic bag to him whilst removing other packages from the compartment.

(b) The first search on the car had been carried out by SP3 with the help of the police sniffer dog arranged by a Bukit Aman Officer but nothing incriminating was found.

[55] Even if it is not disputed that the packages were concealed in the compartment below the steering wheel towards its right, in order to prove custody or control over the said packages, the prosecution must prove that the accused had some idea of the whereabout of the packages or at the very least strong inference can be drawn that he knew the existence of such packages.

[56] In *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; [1956] 22 MLJ 28, Taylor J in his judgment at p. 29 said:

> There is no presumption of custody. The presumption is from custody. Custody means having care or guardianship. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them not amounting to possession.
>
> A man must know of the existence of a chattel and have some idea of its whereabout before he can exercise any control over it.

[57] The mere presence of the accused in the BMW car in the absence of any other evidence is insufficient to prove that the accused knew that the packages were concealed in the compartment behind the steering wheel. The fact that the said packages could not have been detected by a search carried out by SP3 with the aid of the police sniffer dog clearly shows that the packages were very well concealed and could not be easily detected by the police let alone a lay person.

[58] In the absence of any knowledge of the packages, it cannot be said that the packages were in the custody or control of the accused.

(c) On the issue whether the 'drugs' recovered from the side pocket of the driver's door by SP3 though not in issue, is relevant to prove possession of the proscribed drugs which constitutes the fact in issue in this case.

[59] The prosecution submits that the 'drugs' recovered though not in issue were the same types of drugs found concealed in the compartment of the car which was recovered from the same car and which was so connected with the proscribed drugs found in the compartment as to form part of the same transaction and was a relevant fact.

[60] The learned Deputy Public Prosecutor cited ss. 6 and 7 of the Evidence Act 1950 to support her contention. With respect, I am of the view that ss. 6 and 7 of the Evidence Act are not applicable here as the 'drugs' recovered, that is "4 papan erimen 4, 4 plastik lutsinar berisi serbuk-serbuk kristal disyaki syabu dan 2 peket serbuk-serbuk putih - disyaki ketamine" had not been tendered in court and had not been proven that they were infact dangerous drugs as defined under s. 2 of the DDA.

[61] Even if ss. 6 and 7 were applicable, that does not relieve the prosecution from proving possession of the proscribed drugs found inside the compartment which the prosecution had failed to do so.

(d) Lastly, whether there was a gap of 9 1/2 hours in the prosecution case in relation to the movement of the proscribed drugs from the time the proscribed drugs were seized by SP3 on 14 December 2007 at about 1am to the time they were handed to SP7 (IO) on 14 December 2007 at about 10.30am.

[62] A perusal of the notes of evidence clearly shows that after receiving the packages of the proscribed drugs from SP4, SP3 said that he took the proscribed drugs with him and proceeded to conduct a search on the accused's house. Although no evidence had been adduced as to what he did with the exhibits during the period of 9 1/2 hours, I am of the view that this is not fatal to the prosecution case for the following reasons:

(a) There is no doubt as to the identity of the drugs seized.

(b) SP3 could identify the proscribed drugs tendered in court through his own markings and also through the photographs tendered in court.

(c) The envelopes containing the said proscribed drugs and the seals were intact and were in good condition when they were tendered in court.

[63] For the above reasons, I find that this issue raised by the defence is without merits.

Findings

[64] I find that the evidence adduced by the prosecution against the accused at the close of the prosecution case was insufficient to invoke s. 37(d) of the DDA 1952. The prosecution therefore failed to prove that the accused was deemed to have been in possession of the said proscribed drugs found in the BMW car. Unless the accused was in possession or that he was at least in custody or control of the

A proscribed drugs found in his car, he would not be in a position to traffic in such proscribed drugs: *PP v. Chia Leong Foo* [2000] 4 CLJ 649; [2000] 6 MLJ 705 at 717 and 718. Possesion must be proven before the trafficking definition can be invoked: *PP v. Johar Mustafa* [2004] 5 CLJ 187; *PP v. Roya Boola* [2003] 1 LNS 385.

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[65] In the circumstances, I find that the evidence adduced as a whole at the end of the prosecution case after being subject to the maximum evaluation test has failed to establish a *prima facie* case on both the charges of trafficking against the accused. I therefore acquit and discharge the accused on both the charges without ordering her to enter her defence.

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